Office-Supreme Court, U.S.
FILED
JUN 8 1985
ALEXANDER L. STEVAS,
CLERK

(3)

NO. 84-1787

IN THE SUPREME COURT OF
THE UNITED STATES
OCTOBER TERM, 1985

JOSEPH ALTON BOWERS

Petitioner

versus

THE CONTINENTAL INSURANCE COMPANY

Respondent

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI FROM A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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STATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

(1) Whether a lawsuit for payment of optional personal injury protection (no fault) benefits by a policy holder against his own insurance carrier is a "direct action" as defined at Title 28, United States Code §1332(c).

(2) Whether plaintiff was entitled under the Georgia Motor Vehicle Accident Reparations Act, O.C.G.A. Ch. 34, to stack optional personal injury protection (no fault) benefits and to recover an amount greater than the highest coverage purchased in any one policy.

(3) Whether the trial court erred in ruling that plaintiff, as a matter of law, was not entitled to recover bad faith penalties, attorney's fees

and punitive damages under O.C.G.A. §33-34-6(b)(c).

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STATEMENT OF THE CASE

FACTUAL BACKGROUND

On February 26, 1976, plaintiff, Joseph Alton Bowers, applied to defendant for a policy of automobile liability insurance. Defendant issued plaintiff Policy No. 31P 0922 0743 with aggregate personal injury protection limits of $5,000.00.

On July 17, 1979, plaintiff applied to defendant for a second policy of automobile liability insurance and was issued Policy No. 31P 0970 8187 with aggregate personal injury protection limits of $5,000.00.

Both of the policies issued by defendant to plaintiff were in full force and effect on August 24, 1981, when plaintiff was injured while operating a truck owned by J. A. Bowers Builders, Inc. The truck being driven by plaintiff on

August 24, 1981, was insured under a policy of commercial automobile insurance issued to J. A. Bowers Builders, Inc., by the Aetna Insurance Company. As a result of the accident of August 24, 1981, plaintiff received the sum of $43,750.00 in personal injury protection benefits from the Aetna Insurance Company under the policy of insurance issued to J. A. Bowers Builders, Inc.

By letter dated April 26, 1982, plaintiff demanded defendant pay him $92,419.16 in optional personal injury protection benetifs as a result of the aforesaid accident of August 24, 1981. Defendant did not receive an accompanying proof of loss or an additional premium for the optional benefits demanded by plaintiff.

Defendant subsequently paid plaintiff personal injury protection benefits in the amount of $6,250.00.

SUMMARY OF THE ARGUMENT

1. Diversity is not precluded where a lawsuit is brought by an insured against his insurer for failure to meet policy obligations. Title 28, United States Code §1332(c) is applicable only to actions brought against insurers as payor of judgments based on negligence of one of their insureds. Dairyland Insurance Co. v. Makeover, 654 F2d 1120, 1125 (5th Cir. 1981).

2. The Georgia appellate courts have ruled that personal injury protection (no fault) benefits required to be paid under the Georgia Motor Vehicle Accident Reparations Act shall not exceed basic benefits of $5,000.00 and such greater amount of optional

coverage as has been purchased under any one policy. Voyager Casualty Insurance Co. v. King, 172 Ga. App. 269, 323 SE2d 4 (1984) cert denied No. 41655 (Ga. Nov. 6, 1984).

3. Where an insured's demand for payment of personal injury protection (no fault) benefits is excessive or unjust the insurer cannot be penalized for failure to meet the insured's demand. Georgia Farm Bureau & Insurance Co. v. Pendley, 155 Ga. App. 674, 677-678, 272 SE2d 566 (1980). In the present case, plaintiff's uncompromising demand for payment of $45,000.00 under each of the two policies of automobile insurance issued by defendant was excessive and defendant's belief that plaintiff had recovered basic personal injury protection (no fault) benefits of $5,000.00 and optional personal injury protection (no fault)

benefits of $45,000.00 from Aetna was reasonable and in good faith. Cf, Baron v. State Farm Mutual Automobile Insurance Co., 157 Ga. App. 16, 20, 276 SE2d 78 (1981).

ARGUMENT AND CITATION OF AUTHORITY

A.

AN ACTION BY A POLICY HOLDER AGAINST HIS OWN INSURANCE CARRIER FOR PAYMENT OF NO FAULT BENEFITS IS NOT A DIRECT ACTION WITHIN THE MEANING OF TITLE 28, UNITED STATES CODE §1332(c).

Plaintiff's contention that defendant's removal of his complaint from the State Court of DeKalb County, Georgia to the United States District Court for the Northern District of Georgia should have been remanded is based on Title 28, United States Code §1332(c). See also, Ford Motor Co. v. Insurance Company of North America, 669 F2d 421 (6th Cir. 1982) and McMurray v. Prudential Property and Casualty Insurance Co., 458 F.Supp. 209 (ED Mich. 1978). Specifically plaintiff argues (1) that his suit against

Continental was a "direct action" within the meaning of Title 28, United States Code §1332(c), and (2) that since he, as the named insured, is not a party defendant to the suit, his residence is imputed to defendant Continental Insurance Company and diversity destroyed.

Title 28, United States Code, §1332(c) in pertinent part states:

> "Provided further, that in any direct action against the insurer on a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business."

As was recognized by the Circuit Court plaintiff's argument appears at first glance to be supported by the literal language of the statute. Bowers v.

Continental Insurance Co., ___F2d ____ (11th Cir. 2/27/85) (Nos. 83-8787, 84-8084) at p. 2246. The Court pointed out, however, that plaintiff's argument for removal was not supported by either the legislative history of Title 28, United States Code §1332(c) or by existing authority.

Title 28, United States Code, Section 1332(c), was enacted by Congress in response to "direct action" statutes enacted in Louisiana and Wisconsin and "refers only to cases brought by an alleged victim of a tort under a 'direct action' statute against the liability insurer of the alleged tortfeasor." White v. United States Fidelity & Guaranty Co., 356 F2d 746, 747 (1st Cir. 1966); Newson v. Zurich Insurance Co., 397 F2d 280 (5th Cir. 1968).

"The purpose of the proposed

> legislation is to amend section 1332(c) of Title 28, United States Code, so as to eliminate under the diversity of jurisdiction of the United States district courts, suits on certain tort claims in in which both parties are local residents, but which under a state 'direct action' statute, may be brought directly against a foreign insurance carrier without joining the local tort-feasor as a defendant." White v. United States Fidelity & Guaranty Co., supra, at 747, quoting Senate Report No. 1308, 88th Congress, 2d Session, 1 U.S. Code Cong. & Admin. News, 1964, p. 2278 (1964); See also, Torres v. Hartford Insurance Co., 588 F2d 848, 849-850 (1st Cir. 1978).

The "direct action" restriction contained in §1332(c) was clearly not intended to apply to suits brought by insureds against their own insurer. Several courts have made this explicit by holding that a suit by an insured against his own insurance company is not a "direct action" within the meaning of Title 28, United States Code §1332(c).

Eg., White v. United States Fidelity & Guaranty Co., 356 F2d, at 747-748; Spooner v. Paul Revere Life Insurance Co., 578 F.Supp. 369, 373 (ED Mich. 1984); Fidelity and Deposit Co. v. Southern Utilities, Inc., 542 F.Supp. 692, 693 (MD Ga. 1981); O'Hanlon v. Hartford Accident and Indemnity Co., 439 F.Supp. 377, 380 (D. Del. 1977); Adams v. State Farm Mutual Automobile Insurance Co., 313 F.Supp. 1349 (ND Miss. 1970); Bishop v. Allstate Insurance Co., 313 F.Supp. 875 (WD Ark. 1970).

While some courts have expanded Section 1332(c) to reach beyond policies of automobile insurance, it has never been applied where a policy providing other than "liability" coverage was involved, or where the action was other than a "direct action" within the meaning of the statute. See, Hernandez v.

Travelers Insurance Co., 489 F2d 721, 724, n. 1 (5th Cir. 1973) where Section 1332(c) was applied to a policy providing workers' compensation coverage but the court in dicta stated that §1332(c) would not be applicable to destroy diversity where a suit is brought by an "insured"; Velez v. Crown Life Insurance Co., 599 F2d 471, 473 (1st Cir. 1979) where Court said that diversity is not precluded where a suit is brought against an insurer for failure to meet policy obligations except where the action is brought against the insurer as payor of a judgment based on negligence of one of its insureds; Dairyland Insurance Co. v. Makeover, 654 F2d 1120, 1125 (5th Cir. 1981), citing White v. United States Fidelity & Guaranty Co., 356 F2d 746, 747 (1st Cir. 1966) where the Court said that §1332(c) is not applicable if the plaintiff is the insured; and

Newsom v. Zurich Insurance Co., 397 F2d 280 (5th Cir. 1963) where the Court said that the purpose of §1332(c) was clearly to prevent the use of "direct action" statutes as vehicles to get insurers into federal court where both the plaintiff and the insured are residents of same state.

Plaintiff's position is not even supported by the holdings of those cases cited in his brief. See, Ford Motor Co. v. Insurance Company of North America, 669 F2d 421 (6th Cir. 1982); McMurray v. Prudential Property and Casualty Insurance Co., 458 F.Supp. 209 (ED Mich. 1978).

Ford Motor Co. v. Insurance Company of North America was an action against a resident tortfeasor's nonresident insurance carrier and did not involve an insured suing his own insurer. 669 F2d 421. Similarly, McMurry v. Prudential Property and Casualty Insurance Co., was

a suit by an injured automobile passenger against the owner-driver's insurance carrier. 458 F.Supp. 209 at 211. In both cases the Michigan No Fault Statute acted as a substitute for liability coverage.

The district court in McMurray made it explicitly clear that it was not extending the scope of Title 28, United States Code §1332(c) beyond existing authority by stating that "(t)he proviso [§1332(c)] should apply in no fault suits, at least where the named insured is not the plaintiff." 458 F.Supp. at 211. Plaintiff's argument also fails to consider that the facts of the present case are practically identical to those of another Michigan case in which the same court that decided McMurray held that an action for no fault benefits brought by an "insured" was not a "direct

action" within the meaning of Title 28, United States Code §1332(c). Watkins v. Allstate Insurance Co., 503 F.Supp. 848, 851 (ED Mich 1980).

Plaintiff has failed to show either that the Courts below have misapplied existing authority or that the construction given Title 28, United States Code §1332(c) by the Eleventh Circuit Court of Appeals is inconsistent with that of another circuit. Plaintiff's action was not a suit brought under a policy of liability insurance by a party injured as the result of an insured's negligence (or act) but was instead an action brought by a named insured to which §1332(c) is not applicable.

B.

PLAINTIFF WAS NOT ENTITLED TO RECOVER PERSONAL INJURY PROTECTION (NO FAULT) BENEFITS IN EXCESS OF $50,000.00 FOR THE ACCIDENT OF AUGUST 24, 1981.

The heart of the proceedings below involve not plaintiff's contention that the complaint should be remanded to the State Court of DeKalb County but instead plaintiff's demand that he recover optional personal injury protection (no fault) benefits of $45,000.00 under each of two policies of personal automobile insurance

issued by defendant.[1] The facts essential for resolution of this issue were undisputed and the law clear. See, Voyager Casualty Insurance Co. v. King, 172 Ga. 269, 323 SE2d 4 (1984) cert denied No. 41655 (Ga. Nov. 6, 1984).

Plaintiff was injured on August 24, 1981, while driving a truck owned by J. A. Bowers Builders, Inc. At the time of the accident plaintiff was named as an insured in two policies of personal automobile insurance issued by defendant, as well as being provided coverage by a

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1 The Georgia Motor Vehicle Accident Reparations Act in effect on August 24, 1981, provided a statutory scheme which required that all policies of automobile liability insurance issued in Georgia contain basic personal injury protection (no fault) coverage of $5,000.00 and offer the named insured an opportunity to accept or reject in writing optional personal injury protection (no fault) coverage with aggregate limits of up to $50,000.00. O.C.G.A. §33-34-5 (Ga. Code Ann. §56-34046)

policy of automobile insurance issued by the Aetna Insurance Company to J. A. Bowers Builders, Inc.[2] Each of the three policies provided basic personal injury protection (no fault) coverage of $5,000.00 and optional personal injury protection (no fault) coverage of $45,000.00.[3] After the accident plaintiff was paid personal injury protection benefits in the total amount of

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2 Under Georgia law the insurance policy insuring the automobile in which an injured person is riding has primary coverage. Baron v. State Farm Mutual Automobile Insurance Co., 157 Ga. App. 16, 20, 276 SE2d 78 (1981). Policies on other vehicles which name the injured party as an insured are treated as providing secondary coverage.

3 The optional coverage was provided as the result of the decision of the Georgia Supreme Court in Flewellen v. Atlanta Casualty Insurance Co., 250 Ga. 709, 712, 300 SE2d 673 (1983).

$50,000.00.[4]

Defendant does not contest plaintiff's right to recover basic personal injury protection (no fault) benefits of $5,000.00 plus optional personal injury protection (no fault) benefits of $45,000.00 as a result of the accident of August 24, 1981. In fact, defendant's response to plaintiff's motion for summary judgment conceded as much. Defendant does contest plaintiff's right to recover personal injury protection (no fault) benefits in excess of $50,000.00.

Plaintiff's contention that the Georgia Motor Vehicle Accident Reparations Act should be interpreted to allow the

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4 Aetna paid basic personal injury protection (no fault) benefits of $5,000.00 plus optional personal injury protection (no fault) benefits of $38,750.00. Defendant completed the payment of $50,000.00 by paying plaintiff optional personal injury protection (no fault) benefits of $6,250.00.

stacking or pyramiding of optional personal injury protection (no fault) coverages has been previously reviewed by the appellate courts of Georgia and rejected. Voyager Casualty Insurance Co. v. King, 172 Ga. App. 269, 271, 323 SE2d 4 (1984) cert denied No. 41655 (Ga. Nov. 6, 1984). See also, Georgia Farm Bureau Mutual Insurance Co. v. Musgrove, 153 Ga. App. 690, 691-692, 266 SE2d 228 (1980); and Georgia Casualty & Surety Co. v. Waters, 146 Ga. App. 149, 246 SE2d 202 (1978).

In support of his attempt to stack optional personal injury protection (no fault) benefits plaintiff cites no favorable Georgia authority but instead makes extensive reference to factually distinguishable cases from other jurisdictions. See, Yamaguchi v. State Farm Mutual Automobile Insurance

Co., 515 F.Supp. 186 (Hawaii 1980); and Belk v. Nationwide, 244 SE2d 744 (S.C. 1978). With all due deference to those courts which decided the cases cited by plaintiff, defendant believes that the decision of the Georgia appellate courts prohibiting the stacking of optional personal injury protection (no fault) benefits properly interprets the Georgia Motor Vehicle Accident Reparations Act and specifically O.C.G.A. §33-34-4(c).

The decision in Voyager relied upon O.C.G.A. §33-34-4(c) which states:

> "The total benefits required to be paid under this Code section without regard to fault as a result of any one accident shall not exceed the sum of $5,000.00 per each individual covered as an insured person or such greater amount of coverage as has been purchased on an optional basis as provided in Code Section 33-34-5, regardless of the number of insurers providing such benefits or of the number of policies

providing such coverage" (Ga. Code Ann. §56-3403b)

and held that the Georgia Motor Vehicle Accident Reparations Act indicates a clear legislative intent to prohibit the stacking of both basic and optional personal injury protection (no fault) coverages. Ibid at 270.

Absent a finding that the interpretation given O.C.G.A. §33-34-4(c) in Voyager Casualty Insurance Co. v. King was fundamentally unfair, its application by the Eleventh Circuit Court of Appeals in this case leaves nothing to review. See, Gooding v. Wilson, 405 US 518, 92 SCt 1103, 31 LEd2d 408 (1972); CIR v. Bosch's Estate, 387 US 456, 87 SCt 1776, 18 LEd2d 886 (1967); Allen v. A.G. Edwards & Sons, 606 F2d 84 (5th Cir 1979); Eason v. Weaver, 557 F2d 1202 (5th Cir 1977); Kincaid Cotton Co. v. Kesey Bros., 504 F2d 876 (5th Cir 1974).

C.

THE TRIAL COURT'S RULING THAT PLAINTIFF WAS NOT ENTITLED TO RECOVER A STATUTORY PENALTY, ATTORNEY'S FEES OR PUNITIVE DAMAGES WAS CORRECT.

Plaintiff alleges that the trial court's ruling that he was not entitled as a matter of law to recover a statutory penalty, attorney's fees and punitive damages under O.C.G.A. §33-34-6(b)(c) was error. Georgia law requires that personal injury protection (no fault) benefits be paid within thirty days after an insurer receives reasonable proof of loss. If benefits are not paid within thirty days after receipt of reasonable proof of loss the insured may bring an action to recover the benefits and the insurer must show that its failure or refusal to pay was in

good faith, otherwise the insurer is liable for a penalty not exceeding 25 percent of the amount due plus reasonable attorney's fees. O.C.G.A. §33-34-6(b). In the event an insurer fails or refuses to pay personal injury protection (no fault) benefits for more than sixty days after receipt of reasonable proof of loss Georgia law provides that the insured may file an action to recover the benefits due, and if the insurer fails to prove that its failure or refusal to pay benefits was in good faith, the insured may seek to recover punitive damages in addition to a statutory penalty not to exceed 25 percent and reasonable attorney's fees. O.C.G.A. §33-34-6(c).

The standard applicable to O.C.G.A. §33-34-6(b)(c) is the good faith of the insurer and the burden of proving good

faith is on the insurer.[5] See, Bituminous Casualty Corp. v. Mowery, 145 Ga. App. 45 244 SE2d 573 (1978). If an insurer can show a reasonable and probable cause for its failure to pay benefits within the statutory periods of time the insurer's defense legally vindicates its good faith. Ibid at 45. Bad faith on the part of an insurer has been described as a "frivolous and unfounded denial of liablity." State Farm Mutual Automobile Insurance Co. v. Harper, 125 Ga. App. 696, 701, 188 SE2d 813 (1972). See also, Georgia Farm Bureau Mutual Insurance Co. v. Pendley, 155 Ga. App. 674, 677, 272 SE2d 566 (1980).

Plaintiff's contention is that defendant was provided reasonable proof of loss

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In interpreting O.C.G.A. §33-34-6, and its application to no fault insurers, Georgia courts have examined cases construing O.C.G.A. §33-4-6, a similar law applying generally to bad faith refusals of insurers to pay benefits.

on April 26, 1982 and failed to pay even the $6,250.00 ultimately found owing by the district court within the statutorily prescribed periods of time.[6] Plaintiff relies generally on those cases which hold that the question of an insurer's good faith is usually for the jury. E.g., Georgia Farm Bureau Mutual Insurance Co. v. Pendley, 155 Ga. App. 674, 677, 272 SE2d 566 (1980).

Plaintiff's argument overlooks equally applicable cases which support the district court's decision to deny

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To avoid imposition of bad faith penalties defendant must show good faith for its failure to pay benefits between the date of plaintiff's original demand, April 26, 1982 and the date plaintiff filed suit, July 27, 1982. Georgia law provides that the statutory 30 and 60 day periods must lapse before the date suit is filed. A period of bad faith failure to pay benefits after suit is filed is insufficient. See, E.g., Life Insurance co. v. Burke, 219 Ga. 214, 222, 132 SE2d 737, 742 (1963); Doran v. Travelers Indemnity Co., _____ Ga. _____, _____ SE2d _____ No. 41550 (Ga. Feb. 27, 1985) p. 7.

statutory bad faith penalties and punitive damages. See, Georgia Farm & Insurance Co. v. Pendley, 155 Ga. App. 674, 677-678, 272 SE2d 566 (1980) where the court held that when a demand for payment of no fault benefits is unjust or the amount claimed excessive, the insurer cannot be penalized for refusing to comply with the demand; American Interstate Insurance Co. v. Revis, 156 Ga. App. 204, 205, 274 SE2d 586 (1980); Georgia Farm & Insurance Co. v. Matthews, 149 Ga. App. 350, 352, 254 SE2d 413 (1979); and Allstate Insurance Co. v. Torok, 168 Ga. 517, 519, 309 SE2d 676 (1983).

Plaintiff's argument also overlooks that the trial court's finding that "until recently Continental Insurance company apparently believed that plaintiff had received $50,000.00 in PIP benefits under the Aenta Insurance Company policy" was undisputed in the proceedings below, as

well as being supported by applicable Georgia case law. See, Baron v. State Farm Mutual Automobile Insurance Co., 157 Ga. App. 16, 21, 276 SE2d 78 (1981) (an injured person must exhaust the PIP limits of the policy covering the car in which he was riding when injured before seeking payment of PIP benefits under his personal policy).

In the present case plaintiff failed to exhaust the personal injury protection (no fault) coverage provided by the Aetna policy before demanding payment of benefits from defendant. Instead of exhausting the Aetna coverage limits, plaintiff accepted a payment of less than the full personal injury protection (no fault) coverage provided by Aetna and then demanded an amount from defendant which has since been held to have been excessive. See, Georgia Farm Bureau Mutual Insurance

Co. v. Pendley, 155 Ga. App. 674, 677, 272 SE2d 566 (1980).

The district court acted properly in denying plaintiff's request for statutory penalties and punitive damages under O.C.G.A. §33-34-6(b)(c).

CONCLUSION

For all the foregoing reasons, and because the instant Petition for a Writ of Certiorari does not present an issue of the nature enunciated in this Court's Rule 17, Continental Insurance Company, defendant in the proceedings below, respectfully submits that the Petition for Writ of Certiorari filed by Joseph Alton Bowers should be denied.

McLAIN & MERRITT, P.C.

BY: M. David Merritt
M. DAVID MERRITT

BY: William S Sutton
WILLIAM S. SUTTON

APPENDIX

Sufficient Appendicies have been filed as part of plaintiff's Petition for Writ of Certiorari.

CERTIFICATE OF SERVICE

This is to certify that I have this day served three copies of the foregoing Opposing Petition for Writ of Certiorari From a Decision of the United States Court of Appeals for the Eleventh Circuit upon Ronald Arthur Lowry, attorney for Petitioner, Joseph Alton Bowers, Zushmann, Small, Stamps & White, A Professional Corporation, Post Office Box 53483, Atlanta, Georgia 30355 by depositing same in the United States Mail in a

properly addressed envelope with adequate postage thereon.

This 5 day of June, 1985.

By: M. David Merrit

M. David Merrit
Attorney for Respondent
The Continental
Insurance Company

Sworn to and subscribed before me this 5th day of June, 1985.

Brenda P. Wise

Notary Public

Notary Public, Georgia, State at Large
My Commission Expires Nov. 28, 1988

STATEMENT

Pursuant to Rule 28.2 of the Rules of the Supreme Court, this statement certifies that the original and forty copies of a brief opposing petition for writ of certiorari from a decision of the United States Court of Appeals for the Eleventh Circuit in the above styled case were deposited in a United States post office or mailbox, with first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States. This mailing took place in Atlanta, Georgia on Wednesday, June 5, 1985, within the time permitted by the Rules of the Supreme Court for the

filing of a brief opposing a petition for a writ of certiorari in this case.

Respectfully submitted,

By: M. David Merritt

M. David Merritt
Attorney for Respondent
The Continental
Insurance Company

Sworn to and subscribed before me this 5th day of June, 1985.

Brenda P. Wise

Notary Public

Notary Public, Georgia, State at Large
My Commission Expires Nov. 28, 1988